# Notes

## Reparation Award under Rates Set by Interstate Commerce Commission

The power of the Interstate Commerce Commission to award reparation for the exaction of unreasonable rates[1] is unquestioned, where the rates have been initiated by carriers.[2] But in *Arizona Grocery Co. v. Atchison, T. & S. F. Ry.*,[3] a case of first impression, the Supreme Court, with two justices dissenting, has denied this power where the unreasonable rate has been prescribed by the Commission itself through inadequate evidence or an erroneous finding. The Court premised its decision on the legislative character of the Commission's rate orders and the conclusive presumption that they are reasonable. And since the Commission acts in a judicial capacity in awarding reparation,[4] it was held that it could not ignore the validity of its legislative enactments and retroactively deprive the carrier of the protection of its previous order. The extent of the Commission's power was thus determined to be the formulation of a new rate order for the future.[5]

Although the decision seemingly effectuates an equality by confining the shipper to the same remedy as the carrier, that is, a proceeding for a new rate, it might be argued that the position of the carrier is now the more advantageous. For the carrier's more intimate knowledge of the operation of a new schedule permits it to determine the question of reasonableness far earlier than the shipper, and its superior organization enables it to apply for relief more quickly and effectively than the comparatively unorganized and necessarily less informed shipper. On the other hand, the carrier's position would have been the more difficult had the court held that the fixing of a maximum, or a maximum and minimum, rate did not relieve the carrier from the duty imposed by the Interstate Commerce Act to charge only a reasonable rate.[6] It would be forced to reduce a rate to protect the shipper where the maximum was unreasonably high, but would

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[1] 36 Stat. 554 (1910), 49 U. S. C. § 16 (1) (1926); Miller, Legislative Evolution of the Interstate Commerce Act (1930) 181.

[2] The power to initiate rates has never been taken from the carriers under the Federal system of regulation. See Skinner & Eddy Corp. v. United States, 249 U. S. 557, 564, 39 Sup. Ct. 375, 378 (1919).

[3] 52 Sup. Ct. 183 (Jan. 4, 1932) *aff'g* 49 F. (2d) 563 (C. C. A. 9th, 1931). 1931).

[4] See Baer Bros. v. Denver & R. G. R. R., 233 U. S. 479, 486, 34 Sup. Ct. 641, 644 (1914).

[5] State commissions have been held to be likewise limited in power. El Paso & S. W. R. R. v. Arizona Corporation Commission, 51 F. (2d) 573 (D. Ariz. 1931) and cases there cited. But it must be noted that in these cases the system of regulation provided for the fixing of rates exclusively by the Commission with no possibility of discretionary adjustment by the carrier, and no statutory grant of the reparation power for unreasonable rates to the Commission. Only in Northern Pac. Ry. v. Dep't of Public Works, 136 Wash. 389, 240 Pac. 362 (1925) has the limitation been incorporated into a system of the Federal type.

[6] 41 Stat. 475 (1920), 49 U. S. C. § 1 (4) (5) (1926).

be unable to raise a rate to protect itself where the maximum was unreasonably low. And its inability to raise charges would give no right to reparation from the shippers, although the converse would be true if it failed to lower them. While the opinion does not discuss the shipper's position, and only mentions the limitations on the carrier, it may be inferred from the result reached that in the court's estimation the latter equities proved the more persuasive.

The dissent[7] is based on the desirability of maintaining a flexible system of administration whereby the Commission may prospectively control an inherently experimental rate structure, and retrospectively correct any errors by an award of reparation to injured shippers.[8] It was argued by the appellant that to limit the Commission to the institution of new schedules for rectification of errors would impose upon it the unbearable burden of a constant re-examination of its rates. The majority opinion, however, considered such re-examination a necessary incident of the rate-making power, and further pointed out that with the Act in its present form the vast majority of rates would remain carrier made.

The instant decision actually denies the power of the Commission to award reparation only in situations where the unreasonable rate results from an erroneous order. But a change in conditions may cause a rate which was accurate when enacted by the Commission to become unreasonable. The Commission itself has in such a case awarded reparation,[9] and it would seem highly undesirable to divest it of this power. Otherwise the carrier will be permitted to evade its duty by the unwarrantable protection of a rate predicated on circumstances which no longer exist, a manifest contravention of the prohibition to charge any excessive rate.[10]

The power to award reparation may also be questioned in the case of rates based on a general adjustment order of the Commission. In the recent case of *Eagle Cotton Oil Co. v. Southern Ry. Co.*,[11] it was held that such rates would not be considered Commission made inasmuch as the adjustment orders were based only on the general level of all rates, and did not result from investigation of any particular rates. Consequently the reparation order was affirmed. Since the individual maladjustments which inevitably follow sweeping orders can only be partially alleviated by the Commission's use of "saving clauses" whereby adversely affected interests may except themselves upon proper showing,[12] this power to award reparation is necessary to secure an adequate remedy to injured shippers. It is to be hoped therefore that the instant decision will not be interpreted to restrict the Commission's power to award reparation in this situation, and in that involving unreasonableness due to changed conditions.

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[7] The dissent follows the concurring opinion in Eagle Cotton Oil Co. v. Southern Ry. Co., *infra* note 11, wherein it is submitted that the Commission has power to award reparation whether the rates are carrier made or Commission made.

[8] *Cf.* 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 368-371.

[9] Arizona Corporation Commission v. Atchison, T. & S. F. Ry., 156 I. C. C. 418 (1929).

[10] *Cf.* Marinette, T. & W. R. R. v. Railroad Commission of Wisconsin, 195 Wis. 462, 465, 466, 218 N. W. 724, 725 (1928).

[11] 51 F. (2d) 443 (C. C. A. 5th, 1931).

[12] See 2 SHARFMAN, THE INTERSTATE COMMERCE COMMISSION (1931) 371 *et seq.*

ATTACHMENT OF CORPORATE ASSETS AFTER DISTRIBUTION TO STOCKHOLDERS AS A BASIS FOR JURISDICTION OVER THE CORPORATION

A GEORGIA corporation exchanged all its assets for stock in a Delaware corporation which it then distributed to its own stockholders.[1] The Delaware corporation, charging misrepresentation as to the value of the assets conveyed, sequestered[2] its stock held in the name of the Georgia stockholders, and brought a bill in equity in Delaware asking for a determination of its damages and for a sale of the stock in an amount sufficient to satisfy its claim.[3] The insolvent Georgia corporation, concededly a necessary party,[4] did not appear. The court in *Nye Odorless Incinerator Corporation v. Nye Odorless Crematory Co.*[5] held that sequestration of the stock did not subject the corporation to the jurisdiction of the Delaware court and further that the action could not be sustained as one *quasi in rem* to try the title to the stock since the plaintiff's claim thereto depended upon fraud in the sale and a wrongful distribution of the proceeds, neither of which was a proper issue in a suit brought strictly to try title. The stock was considered to be only incidentally involved as an asset subject to levy had a judgment been obtained.

Any claim of jurisdiction over the Georgia corporation must be predicated upon its interest in the sequestered stock. Although the satisfaction of a judgment procured by creditors directly against stockholders for the funds wrongfully distributed[6] would extinguish the debt of the corporation to them, its legal interest in those funds is limited to a right of action against its stockholders for the benefit of creditors.[7] To hold that such a right of action in itself confers jurisdiction upon sequestration

[1] Part of the stock received by the Georgia corporation was sold and the proceeds distributed in cash to its stockholders, all of whom resided outside of Delaware.

[2] Why sequestration was used instead of attachment does not appear. Attachment by a corporation of its own stock has been allowed. See Scripture v. Soapstone Co., 50 N. H. 571 (1871) (the attachment was not at issue but the court made no objection to the procedure). Garnishment was allowed in Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348 (1885); see 7 THOMPSON, CORPORATIONS (3d ed. 1927) § 5821.

[3] In the alternative there was a prayer that the stock should be returned to the Georgia corporation.

[4] This admission seems to have been based on Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691 (1893), a case almost precisely in point. Although the report of the principal case gives the erroneous impression that all the stockholders appeared generally, from private information it was learned that one stockholder had sold his stock and did not appear. Without this fact the principal case might have been distinguished from the Swan case which was not against all shareholders.

[5] 156 Atl. 176 (Del. Ch. 1931).

[6] Creditors have been allowed to sue by statute. See ARK. DIG. STAT. (Crawford & Moses, 1921) § 1728; 2 MICH. COMP. LAWS (Cahill, 1915) § 10,018 (joint and several liability); 2 MISS. CUM. CODE (1930) § 4149 (joint and several liability). They may also sue on the theory that distributed capital constitutes a trust for their benefit, or as for a fraudulent conveyance. See cases cited in Note (1928) 55 A. L. R. 8, 116.

[7] Frederick v. McRae, 157 Minn. 366, 196 N. W. 270 (1923); see 7 THOMPSON, CORPORATIONS § 5346; 2 COOK, CORPORATIONS (8th ed. 1923) § 548. But see Swinger v. Hutchenson, 183 Ill. 606, 619, 56 N. E. 388, 393 (1900).

of the stock would permit a court to take jurisdiction over causes of action against a foreign defendant by sequestration of property in the hands of any person against whom the defendant might have a cause of action. This would be an extension even of the rule under garnishment statutes, whereby the transient presence of the garnishee gives jurisdiction over the principal debtor for purposes of garnishment,[8] and would render a mere attachment of the garnishee's property a sufficient basis for jurisdiction over the principal debtor.

By statute in some jurisdictions[9] a judgment against the corporation must be obtained before suit can be brought against its directors or stockholders for illegal distribution of assets, or to enforce the statutory liability of the stockholders for unpaid subscriptions.[10] While in the latter type of action a judgment has not been required where the corporation is clearly insolvent,[11] yet the decisions asserting this exception have involved contract creditors or liquidated claims. To extend it to actions in tort for unliquidated damages would force stockholders of a corporation which had distributed its assets to defend any claim against the corporation for such distribution, no matter how ill founded. Therefore, although it was contended in the principal case that it would be a useless gesture to sue the insolvent Georgia corporation, it would seem preferable to require that unliquidated claims be reduced to judgment in order to protect stockholders from suits of doubtful merit and to enable them to limit themselves to personal defences without trying the case for the corporation.

Once having established the plaintiff as a judgment creditor the place of trial of the remaining issues becomes largely a question of convenience in joining individual stockholders. If the liability of each stockholder be limited to a *pro rata* share of the funds distributed[12] all must be sued to recover the full amount of the claim. But in general the liability of stockholders would seem to be joint and several[13] to the amount of the distribution individually received, contribution from the others being assured by allowing them to be joined by a cross bill, or, if some are outside the jurisdiction, by allowing suit for contribution where service can be made.[14]

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[8] Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625 (1905). For inconveniences resulting from similar cases see Beale, *The Exercise of Jurisdiction in Rem to Compel Payment of a Debt* (1913) 27 HARV. L. REV. 107.

[9] ME. REV. STAT. (1930) c. 56, §§ 102, 103; 3 FLA. GEN. LAWS (Skillman, 1927) § 6581; R. I. GEN. LAWS (1923) § 3503.

[10] 6 THOMPSON, CORPORATIONS, § 4962; 1 COOK, CORPORATIONS, § 200.

[11] 6 THOMPSON, CORPORATIONS, § 4968; 1 COOK, CORPORATIONS, § 200.

[12] Swinger v. Hutchenson, *supra* note 7 (while corporation solvent stockholder liable for all dividends declared from capital but when corporation insolvent liability limited to *pro rata* share of assets necessary to pay debts of corporation); Gedney v. Sanford, 105 Neb. 112, 179 N. W. 385 (1920) (in suit against stockholders on unpaid subscriptions held that all should be joined within state as they were liable only for their *pro rata* share).

[13] See statutes of Maine, *supra* note 9, and Mississippi, *supra* note 6. For a discussion of the problem with regard to partnerships and a summary of the pertinent statutes, see Magruder and Foster, *Jurisdiction Over Partnerships* (1924) 37 HARV. L. REV. 793.

[14] See Arkansas statute cited *supra* note 6. *Accord:* Bartlet v. Drew, 57 N. Y. 587 (1874).

By statute[15] in the principal case the *situs* of the stock for purposes of attachment was Delaware, and all of the Georgia stockholders, except one who had sold his stock, were thus subject to service in that state. Nevertheless without some method of preventing the sale of stock, this advantage might have been lost by disposal of the stock to innocent purchasers for value. The court in dismissing the bill followed the orthodox procedure. Yet a more equitable view would recognize the jurisdiction of a Delaware court over the stock itself and over a subsequent action by a judgment creditor against the individual stockholders. The conditional decree is familiar in equity and the court would not have abused its discretionary power had it allowed the plaintiff a reasonable time to prosecute its suit in Georgia and at the same time held the Delaware stock, on an appropriate bond, to await the outcome of that action.[16]

## DISTRIBUTION OF BANKRUPT'S ASSETS—PROCEEDS RECOVERED FROM TRANSFER INVALID AS TO ONLY SOME CREDITORS

IN the recent case of *Moore v. Bay*[1] a bankrupt executed a chattel mortgage more than four months prior to bankruptcy, which, however, because of failure to file an intention to record within the statutory period, was void by state law as to creditors existing at the time the mortgage was recorded, though valid as to subsequent creditors. This transfer was set aside in the state court on petition of the trustee in bankruptcy. In a contest between prior and subsequent creditors as to the distribution of the proceeds of the property so recovered, it was held by the United States Supreme Court that they should be distributed ratably among all creditors, and not only among prior creditors as contended.

Although the power of the trustee to enforce rights of creditors is derived exclusively from the Bankruptcy Act, he can generally enforce these rights to no greater extent than each creditor could have done under state law had bankruptcy not intervened. Thus where a conveyance, as in the instant case, is void only as to a class of creditors, the trustee's recovery cannot exceed the claims of this class.[2] This has appealed to some courts as cogent reason for applying the state law as well to the distribution of the fruits of such recovery, especially since the Bankruptcy Act makes no specific provision for such a contingency.[3] Accordingly it has fre-

[15] DEL. REV. CODE (1915) § 1986; see Bouree v. Trust Francais Co., 14 Del. Ch. 332, 127 Atl. 56 (1924).

[16] No such machinery has been utilized by the courts. But in Rice v. Sharpleigh Hardware Co., 85 Fed. 559 (C. C. W. D. Tenn., 1898), a foreign corporation obtained a judgment in a state court under a procedure prohibiting a counterclaim. The defendant in the first action garnished this judgment and sued the foreign corporation in the federal court. While it was held that the plaintiff could not garnishee himself, the court retained the action till the issue could be decided in a suit against the foreign corporation. See Foster, *Place of Trial in Civil Actions* (1930) 43 HARV. L. REV. 1217; Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment* (1930) 44 HARV. L. REV. 41.

[1] 284 U. S. 4, 52 Sup. Ct. 3 (1931).

[2] Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 35 Sup. Ct. 377 (1914); Bergin v. Blackwood, 141 Minn. 325, 170 N. W. 508 (1919); Scales v. Holje, 41 Cal. App. 733, 183 Pac. 76 (1919); REMINGTON, BANKRUPTCY (3d ed. 1923) § 1517.

[3] § 65: "Dividends of an equal per centum shall be declared and paid on

quently been held that only creditors as to whom a transaction is void by state law may benefit by the trustee's recovery.[4] But when a trustee acts under Section 67 (c) (3) to preserve a lien obtained by a creditor within the four months' period it has long been settled that he must enforce it for the benefit of all creditors, regardless of the state law.[5] In extending this latter rule of distribution to the situation in which no lien has attached within the period, the instant decision settles a marked conflict.

Except in regard to illegal preferences, the trustee must generally predicate his right to proceed against property either upon his position as successor to the bankrupt's title[6] or as subrogee to creditors' rights.[7] In the former case, the question of distribution of property might arise only when the trustee must also rely on his position as a "creditor armed with process" under Section 47 (2),[8] as for example when he recovers property which the bankrupt had sold but kept in his possession, inducing reliance by creditors thereon so that the purchaser was estopped to deny the bankrupt's title. Since the trustee in such event asserts the estoppel not as subrogee of the misled creditors, but by virtue of the independent power conferred on him by Sec. 47 (2),[9] it would seem that the general policy of equal distribution should not be disturbed. Where property is recovered by the trustee through his subrogation under sections 70 (e) and 67 (a, b) to creditors' rights to set aside fraudulent conveyances and liens invalid for want of record, the decisions on the method of distribution have heretofore been in decided conflict. But since in the instant case the trustee's right to set aside the mortgage was based on both these sections, it seems safely predictable that in all such cases, the same rule of ratable distribution will follow. It would seem clearly applicable, for example, where the trustee sets aside an ordinary fraudulent conveyance,[10]

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all allowed claims, except such as have priority or are secured." The result of the instant case is thus an application of § 65 to funds realized through the trustee's subrogation to creditors' rights.

[4] See *infra*, footnotes 10, 12, 14, 15, 16.

[5] Globe Bank & Trust Co. v. Martin, *supra* note 2.

[6] Bankruptcy Act, § 70 (a).

[7] *Ibid.* §§ 70 (e), 67 (a), (b), (c). See REMINGTON, *op. cit. supra* note 2, § 1402. For the rule as to distribution when the trustee proceeds under § 67 (c) see Globe Bank & Trust Co. v. Martin, *supra* note 2.

[8] The purpose of the section is to enable the trustee to avoid transfers, *etc.*, which by state law only a lien creditor is entitled to avoid. Previously it had been held that in such a situation the trustee stood in the shoes of the bankrupt, and was powerless to act unless some creditor had attached a lien within four months of bankruptcy. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481 (1905). The effect of § 47 (2) is to give the trustee the status of a "creditor armed with process", irrespective of whether such a creditor existed before bankruptcy or not. See REMINGTON, *op. cit. supra* note 2, §§ 1404, 1547.

[9] See Bergin v. Blackwood, *supra* note 2; In re Irwin, 268 Fed. 162 (W. D. Pa. 1920); In re Thompson, 205 Fed. 556 (D. N. J. 1913); REMINGTON, *op. cit. supra* note 2, § 1410. *Cf.* Miller Rubber Co. v. Citizens' Trust & Savings Bank, 233 Fed. 488 (C. C. A. 9th, 1916) (consignment); Clark v. Snelling, 205 Fed. 240 (C. C. A. 1st, 1913) (record title left in bankrupt after conveyance). There are apparently no cases relating to the distribution of such recovery.

[10] In re Kohler, 159 Fed. 871 (C. C. A. 6th, 1908); Mullen v. Warner, 11 F. (2d) 62 (C. C. A. 4th, 1926); *cf.* Cohen v. Schultz, 43 F. (2d) 340 (C. C. A. 3d, 1930). *Contra:* American Trust & Savings Bank v.

or an unlawful sale in bulk,[11] which by state law is void only as to existing creditors; or an unrecorded mortgage which is deemed void only as to subsequent creditors.[12] Similarly when he enforces the liability of corporate officers for misuse of corporate funds on the ground that such action is a fraudulent conveyance as to creditors,[13] although it has been generally held that such liability runs only to existing creditors.[14] The same is true of an illegal payment of dividends to stockholders of a bankrupt corporation.[15] In at least one state that bases stockholders' liability for watered stock on the "fraud" theory, the trustee has been permitted to enforce it, on the theory that the watered issue is a fraudulent transfer; and therefore under the rule of the instant decision any recovery should enure to the benefit of all creditors,[16] although it is well settled that only subsequent creditors have a complaint.[17]

While the result of the instant case has appeared to some courts to

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Duncan, 254 Fed. 780 (C. C. A. 5th, 1918). See also (1927) 36 YALE L. J. 417; REMINGTON, *op. cit. supra* note 2, § 1539.

[11] Dodd v. Raines, 1 F. (2d) 658 (N. D. Ga. 1924); see Brown v. Kossove, 255 Fed. 806 (C. C. A. 8th, 1919).

[12] Becker Co. v. Gill, 206 Fed. 36 (C. C. A. 8th, 1913); In re Rosenthal, 238 Fed. 597 (S. D. Ga. 1916); In re Rosen, 23 F. (2d) 687 (D. Md. 1923). *Contra:* Simmons v. Greer, 174 Fed. 655 (C. C. A. 4th, 1909); In re Riehl, 200 Fed. 455 (D. Md. 1912); In re Cannon, 121 Fed. 582 (D. S. C. 1903); In re Wade, 185 Fed. 664 (W. D. Mo. 1911). The same would seem applicable to an unrecorded conditional sales contract. Augusta Grocery Co. v. Southern Moline Plow Co., 213 Fed. 786 (C. C. A. 4th, 1914); Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97 (C. C. A. 4th, 1914); In re Farmers' Co-op. Co., 202 Fed. 1008 (D. N. D. 1913). And to an unrecorded bailment. In re Tansill, 17 F. (2d) 413 (W. D. S. C. 1922).

[13] Dean v. Shingle, 198 Cal. 652, 246 Pac. 1049 (1926); see Oliver v. Brennan, 292 Fed. 197, 201 (N. D. Cal. 1923). Such a cause of action also runs to the corporation, and may be brought by the trustee on that theory under § 70 (a) (5). But sometimes the trustee is forced to rely on the creditors' claims, as for instance, when the corporation is estopped by its ratification, or in the case of a one man corporation. Scales v. Holje, *supra* note 2; McCullan v. Buckingham Hotel Co., 198 Mo. App. 107, 199 S. W. 417 (1917); THOMPSON, CORPORATIONS (3d ed. 1927) § 1528. *Cf.* REMINGTON, *op. cit. supra* note 2, § 1210.

[14] In re Franklin Brewing Co., 263 Fed. 512 (C. C. A. 2d, 1912); THOMPSON, *op. cit. supra* note 13, § 1415.

[15] But *dicta* in the only cases in which the problem has been considered indicate that only existing creditors may participate in the trustee's recovery. See Mackall v. Pocock, 136 Minn. 8, 161 N. W. 228 (1911); Ratcliff v. Clendennin, 232 Fed. 61, 65 (C. C. A. 8th, 1916). *Cf.* REMINGTON, *op. cit. supra* note 2, § 1209.

[16] None of the existing cases has reached this result. Grand Rapids Trust Co. v. Nichols, 199 Mich. 126, 165 N. W. 667 (1917); *cf.* Courtney v. Youngs, 202 Mich. 384, 168 N. W. 441 (1918). It is more commonly held that when such liability is based on the "fraud" theory, the trustee cannot enforce it. In re Huffman-Salvar Roofing Paint Co., 234 Fed. 798 (N. D. Ala. 1916).

[17] Bonbright, *Shareholders' Defenses Against Liability to Creditors* (1925) 25 COL. L. REV. 408; *cf.* REMINGTON, *op. cit. supra* note 2, § 1207.

work hardship on those creditors whose claims the trustee prosecutes,[18] it is amply justified by the exigencies of administration. A contrary rule would necessarily embarrass speedy liquidation, and increase costs, since it would require an ascertainment as to which creditors are entitled to share, which in most cases would involve the further difficulty of splitting of current accounts.[19] A contrary rule, moreover, would enable a prospective bankrupt to prefer one group of creditors over another by the simple expedient of making a fraudulent conveyance.[20]

### Adoption by Parent Corporation of Subsidiary's Contract Through Lease of its Property

An unusual use of the lease to remove a subsidiary corporation from financial difficulties is presented in the case of *American Cyanamid Co. v. Wilson & Toomer Fertilizer Company.*[1] The plaintiff had contracted with the subsidiary of the defendant for the purchase of phosphate rock, the purchaser to obtain the benefit each year of any price lower than his contract price which the subsidiary might fix for any sale followed by delivery in that year. The defendant, owning all the stock of the subsidiary, leased the latter's property to itself for a term of thirty years, and at the same time succeeded in persuading all the other customers of the subsidiary to cancel contracts made with it at burdensome pre-war prices, and to substitute therefor cost-plus contracts made directly with itself. The plaintiff refused to cancel his contract with the subsidiary, and claimed adoption of it by the defendant, so that he was entitled to a rebate equivalent to the amount by which his contract price exceeded that of the lowest cost-plus contract made by the defendant to its other customers. A directed verdict for the plaintiff in the lower court was reversed, and the case remanded with instructions favorable to the defendant.

While a parent corporation has been required to fulfill existing contract obligations of its subsidiary upon which the latter has defaulted,[2] the instant case presents an attempt to extend a contract provision operative with reference to contracts entered into by the subsidiary so that it would operate with respect to sales contracts entered into by the parent alone. When the parent has been held liable for the existing obligations of its subsidiary, inadequacy of the latter's capital,[3] lack of independent management structures,[4] fraud in the use of the parent-subsidiary device to

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[18] See American Trust & Savings Bank v. Duncan, *supra* note 10. See also (1927) 36 Yale L. J. 417.

[19] See In re Farmers' Co-op. Co., *supra* note 12, at 1010.

[20] See In re Kohler, *supra* note 10, at 873.

[1] 51 F. (2d) 665 (C. C. A. 5th, 1931).

[2] Douglas and Shanks, *Insulation From Liability through Subsidiary Corporations* (1929) 39 Yale L. J. 193, 210, *et seq.*

[3] Luckenbach S. S. Company v. W. R. Grace & Company, 267 Fed. 676 (C. C. A. 4th, 1920).

[4] S. G. V. Company of Delaware v. S. G. V. Company of Pennsylvania, 264 Pa. 265, 107 Atl. 721 (1919) (salaries and prices of subsidiary fixed by parent); Dillard & Coffin Company v. Richmond Cotton Oil Company, 140 Tenn. 290, 204 S. W. 758 (1918) (parent frequently paid financial obligations of subsidiary).

escape contract,[5] or statutory liabilities[6] are usually seized upon to rationalize the result reached. At times, however, cases have been decided solely on the presence or absence of inequity,[7] indicating that substantial injustice to the suing creditor may be the controlling factor.

In the instant case, however, none of these factors were present. The plaintiff had received complete delivery of the goods called for by his contract at a contract price much below prevailing prices. The rebate clause of his contract was evaded as part of a legitimate reorganization plan to prevent the failure of the subsidiary, the evasion being at most a minor phase of the plan. The extent of the obligation under the rebate clause in the plaintiff's contract was conditioned upon affirmative acts of the subsidiary, *i. e.*, sales to others at lower prices. A comparable provision has recently been construed as limited to acts of the party to the contract, hence placing no obligation upon a possessor corporation after a merger.[8] Similarly where a corporation mortgage contained an after-acquired property clause, likewise dependent upon affirmative acts for its operation, it has been held that such a clause does not, upon consolidation, create a lien on property acquired by the consolidated corporation,[9] despite the fact that a stronger case for carrying over the obligation is presented in such a situation than in that of the instant case. In order to hold that a contract with the subsidiary should have the unusual effect claimed by the plaintiff the burden should be upon him to show an express adoption or facts unequivocally indicating adoption of his contract by the parent.[10] Mere isolated lapses from the ritual of separate corporate organization such as those chiefly relied upon by the plaintiff in the instant case[11] should not be sufficient.

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[5] Rice v. Sanger Bros., 27 Ariz. 15, 229 Pac. 397 (1924); Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334 (1905).

[6] United States v. Lehigh Valley R. R., 220 U. S. 257, 31 Sup. Ct. 387 (1911); United States v. Reading Company, 253 U. S. 26, 40 Sup. Ct. 425 (1920).

[7] In re Watertown Paper Company, 169 Fed. 252 (C. C. A. 2d, 1909); Pittsburgh & Buffalo Company v. Duncan, 232 Fed. 584 (C. C. A. 6th, 1916); First National Bank of Seattle v. Walton, 146 Wash. 367, 262 Pac. 984 (1928).

[8] Ducasse v. American Yellow Taxi Operators, Inc., 224 App. Div. 516, 231 N. Y. Supp. 51 (2d Dep't 1928). "But in so far as the extension of the contract depended on the will of the lessee, the possessor corporation is not bound, for the fleet was increased by it and not by the merged corporation." *Ibid.* at 522, 231 N. Y. Supp. at 57.

[9] Susquehanna Trust & Safe Deposit Company v. United Tel. & Tel. Company, 6 F. (2d) 179 (C. C. A. 3d, 1925); Guaranty Trust Company of New York v. New York & Queens County Ry. Company, 253 N. Y. 190, 170 N. E. 887 (1930).

[10] Thus in Wiggins Ferry Company v. Ohio & Mississippi Ry. Company, 142 U. S. 396, 12 Sup. Ct. 188 (1892), the court declared an adoption where the original party to the contract ceased to figure in it and the defendant began to carry it on and enjoy its benefits. To prevent this result in the instant case phosphate to fill the plaintiff's order was delivered to the subsidiary by the parent. It was shipped by the subsidiary to whom payment was made and correspondence exchanged respecting deliveries under the contract.

[11] Much faith was placed in two letters concerning plaintiff's contract written by the parent instead of the subsidiary.

## LIABILITY FOR FEES OF BANKRUPTCY OFFICIALS IN JUDICIAL SALES FREE OF LIENS

IN *Van Huffel v. Harkelrode, Treasurer*,[1] the United States Supreme Court approved a judicial sale free of liens in bankruptcy proceedings. In so doing, it bestowed its sanction upon a device which has been employed by bankruptcy courts at their discretion for over thirty years despite the absence of any express authorization in the present Bankruptcy Act.[2] It has also been employed in equity receiverships,[3] and though apparently not thus far utilized in corporate reorganizations, its simplicity and flexibility would seem to render it a useful instrument supplementing the customary foreclosure sale.[4] In the course of its development the rules governing the operation of this device have become fairly well established. But there remains some doubt as to who should pay the fees of bankruptcy officials upon the consummation of an unencumbered sale when the proceeds thereof are inadequate to satisfy valid liens. Normally the claim of a lien creditor is transferred to the proceeds of the sale by the order decreeing it[5] and if determined to be valid, should be paid in full with interest up to the time of payment by the purchaser.[6] But if the general estate be insufficient, the costs of preserving the particular property and of its sale, including reasonable compensation to the trustee for his services in that connection, may be imposed upon the lienor.[7] He is not, however, usually charged with the commissions of the bankruptcy officers,[8] although a contrary result has occasionally been reached by implying consent to,[9]

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[1] 52 Sup. Ct. 115 (1931) (sale free of state lien for taxes).

[2] 6 REMINGTON, BANKRUPTCY (3d ed. 1923) §§ 2577-2616.

[3] As when its use would enable an advantageous disposition of the property as an entirety, First National Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807 (1887); or would quickly convert burdensome property, Broadway Trust Company v. Dill, 17 F. (2d) 486 (C. C. A. 3d, 1927).

[4] *Cf.* Weiner, *Conflicting Functions of the Upset Price* (1927) 27 COL. L. REV. 132, 137.

[5] George Carroll & Bro. Company v. Young, 119 Fed. 577 (C. C. A. 3d, 1903);

[6] People's Homestead Ass'n v. Bartlette, 33 F. (2d) 561 (C. C. A. 5th, 1929).

[7] No general estate: In re Prince & Walter, 131 Fed. 546 (M. D. Pa. 1904); In re Hansen & Birch, 292 Fed. 898 (N. D. Ga. 1923). *Accord*, no evidence as to sufficiency of general estate: Gugel v. New Orleans National Bank, 239 Fed. 676 (C. C. A. 5th, 1917). *Cf.* In re Stewart, 193 Fed. 791 (E. D. La. 1912).

[8] In re Utt, 105 Fed. 754 (C. C. A. 7th, 1901); Norton Jewelry Company v. Hinds, 245 Fed. 341 (C. C. A. 8th, 1917); Virginia Securities Corporation v. Patrick Orchards, 20 F. (2d) 78 (C. C. A. 4th, 1927); In the matter of Charles A. Richardson, 16 A. B. R. (N. S.) 212 (E. D. La. 1930). *Accord*, when general estate sufficient though lienor has consented to sale: In re Anders Push Button Telephone Company, 136 Fed. 995 (S. D. N. Y. 1905); In re Harralson, 179 Fed. 490 (C. C. A. 8th, 1910); In re Lowell Textile Company, 288 Fed. 989 (D. Mass. 1923).

[9] Lienor purchaser at sale: In re Barber, 97 Fed. 547 (D. Minn. 4th Div. 1899); In re Sanford Furniture Manufacturing Company, 126 Fed. 888 (E. D. N. C. 1903); In re Columbia Cotton Oil & Provision Corporation, 210 Fed. 824 (C. C. A. 4th, 1913); Becker v. Thomas, 14 F. (2d) 829 (C. C. A. 8th, 1926). *Accord*, though no actual consent to sale: In re West, 232 Fed. 903 (M. D. Pa. 1916). *Cf.* In re Stewart, *supra* note 7

or waiver of[10] the imposition of these fees from a lienor's acquiescence in the sale. Clearly, however, this furnishes no consistent criterion of responsibility since consenting lienors have as often been held immune from such liability.[11] It appears, however, that in a majority of the cases in which a lienor has been required to pay these fees, he has been the purchaser at the sale.[12] And this fact would seem to provide a more desirable criterion, since when the lienor has been benefited by being able to purchase the entire property as a unit free of the claims of his fellow lienors, it is equitable that he should reimburse the bankruptcy officials for their services in enabling him to do so.

## Power of State to Obstruct Foreshore Without Compensation to Riparian Owner

The Iowa State Board of Conservation sought to erect a "turn-around" for automobiles which would extend over the waters of a navigable lake in front of a riparian owner's property, cutting off his access to the water and necessitating the destruction of his boat house and wharf. The owner brought suit to enjoin the construction, on the ground that no compensation was provided for. In its decision, denying relief,[1] the Supreme Court of Iowa first conceded the general rule that a riparian owner has a right of access over the foreshore, including the right to wharf out to navigability,[2] although this involved over-ruling a previous decision;[3] but it then held that, while the structure would not aid navigation, yet since it was designed for use by the public, its erection lay within the statutory powers of the board.

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(agreement by trustee to waive fees). Third party purchaser: In re Torchia, 188 Feb. 207 (C. C. A. 3d, 1911) (issue as to imposition of any charges whatever); In re Chambersburg Silk Manufacturing Co., 190 Fed. 411 (M. D. Pa. 1911). *Accord:* In re Tebo, 101 Fed. 419 (D. W. Va. 1900) (disapproved in In re Howard, 207 Fed. 402, 414 (N. D. N. Y. 1913); In re Cramond, 145 Fed. 966 (N. D. N. Y. 1906).

[10] See In re Vulcan Foundry & Machine Company, 180 Fed. 671, 675 (C. C. A. 3d, 1910) (lienor purchaser).

[11] See cases cited *supra* note 8.

[12] See cases cited *supra* notes 9 and 10, particularly In re West, (consent implied from fact of purchase).

[1] Peck v. Alfred Olsen Construction Co., 238 N. W. 416 (Iowa 1931) (four judges dissenting). A petition for a rehearing has been granted.

[2] Yates v. Milwaukee, 10 Wall. 497 (U. S. 1870); Town of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665 (1907); 1 Farnham, Waters and Water Rights (1904) §§ 66-67d. *Contra:* Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539 (1891). Almost every decision denying the existence of a right of access has subsequently been nullified by a statute expressly recognizing it. See Note (1898) 40 L. R. A. 593, 604. Existence of the right seems to have been conceded even in some Iowa decisions. See Musser v. Hershey, 42 Iowa 356, 361 (1876); Renwick, Shaw & Crossett v. Davenport & Northwestern Ry. Company, 49 Iowa 664, 670 (1878). Possession of the right does not depend on ownership of the soil below high-water mark. See Alexandria & Fredericksburg Ry. Company v. Faunce, 72 Va. 761, 764 (1879); Gould, Waters (3d ed. 1900) § 148.

[3] Tomlin v. Dubuque, Bellevue & Mississippi R. R. 32 Iowa 106 (1871). The rule of this case, denying the existence of a right of access, has been widely criticized. See Backus v. City of Detroit, 49 Mich. 110, 113, 13

It is generally conceded that the right of a riparian to access across the foreshore is subject to federal control of commerce [4] and to the exercise of the state's police power in the interest of navigation.[5] But the decisions indicate that these powers are restricted to the enactment of regulatory and protective measures. Thus the state can prohibit the building of piers and wharves beyond such harbor and dock lines as it may establish,[6] and any pier which obstructs navigation can be abated as a public nuisance without compensation.[7] But where the state, in the course of improving navigation, interferes with a wharf, lawfully constructed by a riparian owner in the exercise of his right of access, compensation must be paid.[8] On the other hand, in the absence of damage to physical property, the state incurs no liability for construction in aid of navigation, even though access is completely cut off, as by the erection of a wall or pier away from but directly in front of the upland.[9] But that benefit to navigation is a condition precedent to immunity from liability is indicated by decisions holding that a railroad must compensate a riparian owner whose access is cut off by the construction, under state authority, of tracks along the foreshore.[10] It is difficult to see why the same rule should not apply as well to governmental agencies, and in *Matter of the City of New York* [11] it was held that the city, even under state authority, could not build a speedway along a river between high and low water mark without compensating riparian owners for loss of access. When, as in the principal case, this loss of access is accompanied by the destruction of physical property, the denial of compensation would seem to be an unwarranted extension of the police power beyond its protective function.[12]

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N. W. 380, 381 (1882); GOULD, WATERS § 151; Note (1892) 15 L. R. A. 618. See note 10 *infra*.

[4] Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48 (1900).

[5] Sage v. Mayor, etc. of the City of New York, 154 N. Y. 61, 47 N. E. 1096 (1897).

[6] Prosser v. Northern Pacific R. R., 152 U. S. 59, 14 Sup. Ct. 528 (1894); State v. Sargent & Company, 45 Conn. 358 (1877); 1 LEWIS, EMINENT DOMAIN (3d ed. 1909) §§ 93, 103.

[7] See Town of Brookhaven v. Smith, *supra* note 2, at 87, 80 N. E. at 670.

[8] See Yates v. Milwaukee, *supra* note 2, at 507; Scranton v. Wheeler, *supra* note 4, at 153, 21 Sup. Ct. at 53; United States v. Lynah, 188 U. S. 445, 471, 23 Sup. Ct. 349, 357 (1903).

[9] Sage v. Mayor, etc. of the City of New York, *supra* note 5; Scranton v. Wheeler, *supra* note 4. The Supreme Court defines "taking" in the constitutional sense to mean an interference with physical property, and holds that there is no liability for consequential injury. The complete destruction of a valuable and recognized property right seems more than a consequential injury to it. See Cormack, *Legal Concepts in Cases of Eminent Domain* (1931) 41 YALE L. J. 221; Note (1905) 67 L. R. A. 820, 842 *et seq.*

[10] Rumsey v. New York & New England R. R., 133 N. Y. 79, 30 N. E. 654 (1892), overruling Gould v. Hudson River R. R., 6 N. Y. 522 (1852); Delaplaine v. Chicago & Northwestern Ry. 42 Wis. 214 (1877). *Contra:* Tomlin v. Dubuque, Bellevue, & Mississippi R. R., *supra* note 3, overruled in the principal case; Stevens v. Paterson & Newark R. R., 34 N. J. L. 532 (1870).

[11] 168 N. Y. 134, 61 N. E. 158 (1901). See Coudert, *Riparian Rights; A Perversion of Stare Decisis* (1909) 9 COL. L. REV. 217, 227.

[12] See FREUND, POLICE POWER (1904) § 511; Note (1914) 27 HARV. L. REV. 664.

## CONFIRMATION OF A COMPOSITION IN BANKRUPTCY AS BAR TO SECOND CONFIRMATION WITHIN SIX YEARS

BY Section 12 (d) (2) of the Bankruptcy Act [1] the confirmation of a composition is denied if the debtor has been "guilty" of any acts which would bar his discharge; by Section 14 (b) (5) [2] a direct petition for "discharge in bankruptcy" cannot be heard if the debtor has been granted a "discharge in bankruptcy" within six years; [3] and under Section 14 (c) [4] the confirmation of a composition discharges the bankrupt from his debts. But the Circuit Court of Appeals for the Sixth Circuit has recently held in the case of *Isberg v. Butler Brothers* [5] that the confirmation of a composition does not bar a second confirmation within six years. The court reasoned, first, that Section 14 (c) does not render a confirmation the equivalent of a "discharge in bankruptcy" within the contemplation of Section 14 (b) (5), since the methods of procedure are totally different, and second, that the term "guilty" in Section 12 (d) (2) denotes intentional wrongdoing.

If the first argument were sound, it would seem logically to follow that on a direct petition by the bankrupt a discharge would not be barred by a confirmation within the previous six years. Yet the courts have uniformly decreed otherwise.[6] And the cases [7] which are cited to support the court's second argument are not concerned with Section 12 (d) (2), but only with provisions of Section 14 (b), other than 14 (b) (5),[8] which were held to require a fraudulent act by the bankrupt before he could be denied a discharge. Moreover, if intentional wrongdoing were a necessary element in any act which would bar a confirmation, the consideration of whether such confirmation is the equivalent of a discharge, to which the court devotes the major part of its opinion, would be unnecessary, since in that event not even a discharge on a direct petition would bar a subsequent confirmation within six years.

Nevertheless, the decision is not without some justification. Although in ordinary bankruptcy proceedings a debtor is precluded from obtaining more than one discharge within six years,[9] nevertheless he may have more

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[1] 30 STAT. 550 (1898), 11 U. S. C. § 30 (1926). Under the provisions of this Section, a bankrupt whose offer of a composition has been accepted by a majority of his creditors, representing a majority in amount of claims, may invoke the jurisdiction of the bankruptcy court to compel the assent of the minority.

[2] 32 STAT. 798 (1903), 11 U. S. C. § 32 (1926).

[3] For a criticism of this arbitrary time limit, see Douglas, *Some Functional Aspects of Bankruptcy* (1931) 41 YALE L. J. 329, 360.

[4] 30 STAT. 550 (1898); 11 U. S. C. § 32 (1926).

[5] 53 F. (2d) 454 (C. C. A. 6th, 1931).

[6] Rosenberg v. Borofsky, 295 Fed. 500 (C. C. A. 1st, 1924); In re Radley, 252 Fed. 205 (N. D. N. Y. 1918); In re Massell, 285 Fed. 577 (D. Mass. 1922); In re Holst, 45 F. (2d) 661 (E. D. N. Y. 1930).

As to other situations where a confirmation of a composition is given the full effect of a discharge in bankruptcy, see REMINGTON, BANKRUPTCY (3d ed. 1924) § 3059.

[7] Gilpin v. Merchants National Bank, 165 Fed. 607 (C. C. A. 3rd, 1908); Firestone v. Harvey, 174 Fed. 574 (C. C. A. 6th, 1909); In re Rosenthal, 231 Fed. 449 (C. C. A. 2d, 1916).

[8] See Gilpin v. Merchants National Bank, *supra* note 7, at 610, where the court expressly excludes § 14 (b) (5) in referring to the provisions of Section 14 (b) that require a fraudulent intent.

[9] Section 14 (b) (5) of the Bankruptcy Act, *supra* note 2.

than one adjudication within that period and his property will be distributed each time among his creditors.[10] Moreover, if a bankrupt is to be limited to but one discharge within six years, whether obtained in regular bankruptcy proceedings or by confirmation, majority creditors must be denied a possibly desirable composition where he has obtained a prior discharge within the statutory period. But these considerations would seem to be outweighed by the argument that Section 14 (b) (5) is designed to discourage habitual bankruptcy and will be ineffectual if professional bankrupts may obtain within the statutory period the equivalent of a second discharge by a confirmation.[11]

## Constitutionality of Bad Check Statutes

It has recently been held in *South Dakota v. Portwood*[1] that a "bad check" statute, with a provision that prosecution should be barred if the check were honored or if the drawer should prove that he had issued it without intent to defraud and should pay into court the amount of the check and costs violates the constitutional provision forbidding imprisonment for debt founded upon contract. The decision proceeded upon the theory that the penalty appeared to be inflicted for failure to make satisfaction and not for the original issuance of the check.[2]

Of the universally enacted legislation directed against the utterance of worthless checks, the most typical statute constitutes the intent to defraud an essential element of the crime and only assists the prosecution by providing that the fact of dishonor, or sometimes dishonor plus knowledge of the insufficiency of funds, is *prima facie* evidence of such intent.[3] The constitutionality of these statutes is now unquestioned.[4] When it became apparent, however, that the presumption of intent could be rebutted in situations which appeared to involve evils against which the statutes were aimed, more comprehensive legislation was enacted.[5] And to the same end a number of statutes dispense entirely with the intent requirement.[6] Despite the apparent harshness of this latter type of statute, it has never had the effect of penalizing an innocent mistake by bank or depositor. The

[10] See In re Carmichael, 300 Fed. 255 (N. D. Ala. 1924); In re Johnson, 233 Fed. 841, 843 (S. D. Ala. 1916).

[11] For the argument that even compositions obtained without invoking the jurisdiction of the bankruptcy court should be considered grounds for the denial of a discharge, see Douglas, *op. cit. supra* note 3, at 361.

[1] 238 N. W. 879 (S. D. 1931).

[2] *Accord:* Burnam v. Commonwealth, 228 Ky. 410, 15 S. W. (2d) 256 (1929).

[3] See 2 Paton's Digest (1926) § 1260a. Vermont has an additional law that the maker of a check who knows that there are not sufficient funds in the bank for its payment and which is not paid upon presentation shall be liable in tort, and the Supreme Court of that state has recently held that fraud or deceit are not essential elements of the right of action thereby created. North Adams Beef and Produce Company v. Cantor, 156 Atl. 879 (Vt. 1931).

[4] State v. Meeks, 30 Ariz. 436, 247 Pac. 1099 (1926); Ex parte Shackleford, 64 Cal. App. 78, 220 Pac. 430 (1923); Hollis v. State, 152 Ga. 182, 108 S. E. 783 (1921).

[5] See Legislation (1931) 44 Harv. L. Rev. 451, 455.

[6] No intent is now required in Arkansas, Kansas, Mississippi, North Carolina, North Dakota, and South Dakota.

North Carolina statute, for example, requires knowledge of the insufficiency of funds at the time of utterance.[7] The North Dakota statute[8] has been construed to mean that there is no violation if the person who makes or delivers a check has sufficient funds in the bank on presentation, or has an arrangement with the bank that the check will be paid, or has reasonable expectations of having funds in the bank when the check shall be presented for payment.[9] And by three of the statutes which dispense with the intent requirement, prosecution is barred by satisfaction of the check, usually within a specified number of days after dishonor.[10]

The decision in the instant case, invalidating this last type of statute, is inharmonious with the views of other courts. In Kansas a similar statute has been upheld on the theory that the offense penalized was not the non-payment of the debt, but resort to a practice considered demoralizing to business.[11] The Georgia court read into their statute an implied requirement of fraud and thus brought it within the exception contained in the constitutional provision against imprisonment for debt.[12] And while an Alabama statute which barred prosecution after satisfaction was held invalid, the court implied that it would have reached a contrary result had not the Alabama constitutional interdiction of imprisonment for debt been unique in omitting an exception in cases involving fraud.[13]

## THE MANUFACTURE OF STATE OR FEDERAL JURISDICTION

PURSUANT to an Oklahoma wrongful death statute[1] which required that proceedings thereunder be brought by the administrator and that damages recovered be divided between the widow and children, an Oklahoma administratrix instituted three successive actions in Oklahoma courts against a Louisiana corporation doing business in Oklahoma, and alleged to have negligently caused the death of her husband in that state. Each action was removed by the corporation on grounds of diversity of citizenship, motions to remand were overruled, and each was thereupon dismissed by the administratrix. To obviate the diversity of citizenship between the parties, the widow then resigned as administratrix, and the plaintiff, a

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[7] N. C. CODE ANN. (Michie, 1931) § 4283 (a), upheld in State v. Yarboro, 194 N. C. 498, 140 S. E. 216 (1927).

[8] N. D. Laws 1931, c. 128, p. 211.

[9] State v. Schock, 58 N. D. 340, 226 N. W. 525 (1929).

[10] ARK. DIG. STAT. (Supp. 1931) §§ 743, 743a; KAN. REV. STAT. ANN. (1923) c. 21, § 554; S. D. COMP. LAWS (1929) § 4253.

The statutes of Maryland, Tennessee, and West Virginia, while requiring proof of intent, provide that satisfaction constitutes a complete bar to prosecution. And in twenty states satisfaction rebuts the presumption of intent. See Legislation (1931) 44 HARV. L. REV. 451, n. 31.

[11] State v. Avery, 111 Kan. 588, 207 Pac. 838 (1922). *Accord:* Collier v. State, 40 S. W. (2d) 455 (Ark. 1931). See Note (1923) 23 A. L. R. 459; Note (1925) 35 A.L.R. 375.

[12] Neidlinger v. State, 17 Ga. App. 811, 88 S.E. 687 (1916). Georgia subsequently enacted a law which includes such intent. GA. PEN. CODE (1926) § 211 (34).

[13] Goolsby v. State, 20 Ala. App. 654, 104 So. 906 (1925). The present Alabama statute omits the provision that payment is a bar to prosecution [ALA. ANN. CODE (1928) § 4158] and has therefore been held constitutional in Frazier v. State, 135 So. 409 (Ala. App. 1931).

[1] OKLA. COMP. STAT. ANN. (1921) c. 3, art. 26, §§ 824, 825.

citizen of Louisiana, was appointed administrator in her stead by an Oklahoma probate court. The plaintiff then filed suit in the state court on the same cause of action and the corporation again removed to the federal court. Upon appeal the Federal Supreme Court in *Mecom v. Fitzsimmons Drilling Company*[2] sustained the plaintiff's motion to remand for lack of diversity of citizenship. The Oklahoma statute, charging the administrator with responsibility for the conduct of the suit and the distribution of its proceeds to the proper parties was thought to make the plaintiff the real party in interest, whose citizenship, therefore, rather than that of the beneficiaries or of the intestate, was determinative of federal jurisdiction.[3] The Court further held that the motive actuating the parties to the proceedings was immaterial so long as the plaintiff's appointment was regular; and that the latter issue could not be collaterally raised.

In reviewing the various devices contrived by parties to an action for the purpose either of creating or defeating federal jurisdiction the Supreme Court has quite generally refused to attach significance to the motive unless the circumstances reveal "fraud." Thus in order to create diversity of citizenship a plaintiff may properly remove to another state with a *bona fide* intention to establish a residence there,[4] and in order to avoid diversity of citizenship a person with a tort cause of action against a non-resident company need only join as co-defendant a resident employee of the company if the injured party's cause of action is capable of being treated as joint.[5] But the precise point at which "fraud" appears is not always clearly discernible. The contribution of expenses by residents who have solicited a non-resident to institute the action, has been found unobjectionable,[6] but a change of residence with an intent to return after the suit,[7] or a transfer of property without any consideration to a non-resident "sham" corporation,[8] or the simulated refusal of a board of directors to take legal proceedings in local courts, thereby enabling a non-resident stockholder to bring a representative action,[9] is sufficient to warrant the federal court's dismissal of the action. And while a jury's exoneration of a resident fellow-employee joined for the purpose of defeating federal jurisdiction,[10] or a finding that he has no property,[11] is not

[2] 52 Sup. Ct. 84 (Nov. 23, 1931).

[3] The Court followed Mexican Central Ry. v. Eckman, 187 U. S. 429, 23 Sup. Ct. 211 (1903), wherein the same holding had been made in the case of a guardian.

[4] See Briggs v. French, 2 Sumner 251, 256 (C. C. 1835).

[5] Illinois Central R. R. v. Sheegog, 215 U. S. 308, 30 Sup. Ct. 101 (1909); Chicago, Burlington & Quincy R. R. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460 (1911); Chicago, R. I. & Pacific Ry. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250 (1913). See also, regarding conveyance to non-resident, McDonald v. Smalley, 1 Pet. 620 (U. S. 1828); Smith v. Kernochen, 7 How. 198 (U. S. 1849); Irvine Company v. Bond, 74 Fed. 849 (C. C. S. D. Cal. 1896).

[6] Wheeler v. Denver, 229 U. S. 342, 33 Sup. Ct. 842 (1913).

[7] Morris v. Gilmer, 129 U. S. 315, 9 Sup. Ct. 289 (1889).

[8] Miller & Lux v. East Side Canal Co., 211 U. S. 293, 29 Sup. Ct. 111 (1908); Southern Realty Co. v. Walker, 211 U. S. 603, 29 Sup. Ct. 211 (1909).

[9] Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 560 (1883). But *cf.* Chicago v. Mills, 204 U. S. 321, 27 Sup. Ct. 286 (1907), where the refusal of the directors was in good faith.

[10] Whitcomb v. Smithson, 175 U. S. 635, 20 Sup. Ct. 248 (1900).

[11] Chicago, R. I. & Pacific Ry. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684 (1913).

sufficient, proof that the fellow-employee had no connection with the employer's negligence has been held evidence of a conspiracy to defeat the employer's right of removal.[12]

In the principal case the fact that the Louisiana administrator did not know the deceased or the widow, had no information of the estate of the deceased, did not come to Oklahoma to be appointed, and consented to be substituted in the widow's stead merely as a favor to her attorney might well indicate a collusive attempt to avoid federal jurisdiction. Two lower federal courts had previously so held under similar circumstances[13] On the other hand, it is significant that, while the Federal Judicial Code specifically condemns collusive creation of federal jurisdiction,[14] devices to defeat such jurisdiction are proscribed only if they are deemed repugnant to general policy. And if, in the face of the code stipulation, the Supreme Court once found itself able to permit Kentucky residents to create federal jurisdiction by incorporating in another state for the sole purpose of avoiding the effects of Kentucky law as applied by the courts of that state,[15] it is not difficult to perceive why the device in the principal case did not offend the same court's conception of general good policy. For here a claim was based on a death caused within a state by a foreign corporation doing business therein and was brought under the provisions of a wrongful death statute of that state. In such a situation it seems reasonable that the defendant corporation should be subject to the same alleged disadvantages[16] of state trial as are its competitors and should not be in a position to contest the plaintiff's efforts to secure such a trial.[17]

ESTOPPEL OF INSURANCE COMPANY TO VOID POLICY FOR MISSTATEMENT

INSURANCE policies normally provide that they shall be wholly inoperative in case of any misstatement in the application therefor. But when such a misstatement has been caused by the insurance agent and is unknown to the insured recovery upon the policy has frequently been allowed on the basis of a waiver or an estoppel.[1] But where the application is attached to the

[12] Wecker v. National Enameling & Stamping Co., 204 U. S. 176, 27 Sup. Ct. 184 (1907).

[13] Cerri v. Akron-People's Telephone Co., 219 Fed. 285 (N. D. Ohio 1914); Carter v. St. Louis-San Francisco Ry., 29 F. (2d) 628 (D. Okla. 1928) (partly on the grounds that the administrator was a mere nominal party). *Contra:* Goff's Administrator v. Norfolk & W. Ry., 36 Fed. 299 (C. C. W. D. Va. 1888).

[14] Judicial Code § 37, 36 STAT. 1098 (1911), 28 U. S. C. c. 3, § 80 (1926).

[15] Black & White Taxi Co. v. Brown & Yellow Taxi Co., 276 U. S. 518, 48 Sup. Ct. 404 (1928).

[16] Article 2, section 19, of the Oklahoma Constitution provides that in civil cases and in criminal cases less than felonies, three-quarters of the number of jurors shall have the power to render a verdict. *Cf.* Curtis & Gartside Co. v. Pigg, 39 Okla. 31, 134 Pac. 1125 (1913). In addition to the probable tendency of the local jury to sympathize with the injured party, there may be other material advantages to be gained from a federal trial, such as the power of the judge to comment on the evidence. *Cf.* Ewing v. Goode, 78 Fed. 442 (S. D. Ohio 1897).

[17] See Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928) 13 CORN. L. Q. 499, 523, *et seq.*

[1] Ames v. New York Union Insurance Co., 14 N. Y. 253 (1856); Wood v. American Fire Insurance Co., 149 N. Y. 382, 44 N. E. 80 (1896).

policy the insured has been held strictly to its terms.[2] This "accessibility doctrine" finds support in a distorted construction of Section 58 of the New York Insurance Law,[3] originally enacted to assist the insured by providing, *inter alia* that to be part of the contract applications must be attached to the policy.[4] In *Bollard v. The New York Life Ins. Co.*,[5] this Section was regarded as making the attached application more a part of the policy than before and hence less subject to parol "contradiction", although in the cases allowing proof of an estoppel before its enactment the application was invariably incorporated into the policy by reference. It is, however, difficult to perceive the bearing of accessibility upon the parol evidence rule. The rule might justifiably be invoked to bar a claim of waiver, which is necessarily predicated upon an agreement, if such agreement were antecedent to or contemporaneous with the written contract.[6] But since estoppel is unrelated to agreement and admits the written contract while declaring it inequitable to enforce, the parol evidence rule would seem to have no application.[7]

In the recent case of *Bible v. The John Hancock Mutual Life Insurance Company of Boston*,[8] the New York Court of Appeals admitted parol evidence to show an estoppel with regard to the breach of a policy condition. In that case, an agent procured the signature of the insured to an application while she was in a hospital and collected premiums on a policy there delivered. The policy provided that it should be void if the insured had attended any hospital within two years unless such attendance was expressly waived by the company. The application was not attached and therefore under Section 58 its terms had no effect. It was held that "keeping the premiums with a knowledge of the existing breach of conditions . . . gave rise to a waiver or more properly to an estoppel." If parol evidence is admissable in this situation, there would seem to be no reason

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[2] Carmichael v. The John Hancock Mutual Life Insurance Co., 116 App. Div. 291, 101 N. Y. Supp. 602 (1st Dep't 1906). Accord: Hook v. Michigan Mutual Life Insurance Co., 44 Misc. 478, 90 N. Y. Supp. 56 (Sup. Ct. 1904); *aff'd*, 139 App. Div. 922, 123 N. Y. Supp. 1121 (3d Dep't 1910).

[3] N. Y. CONS. LAWS (Cahill, 1930) c. 30.

[4] See (1931) 15 MINN. L. REV. 595; Note (1930) 16 CORN. L. Q. 235.

[5] 98 Misc. 286, 162 N. Y. Supp. 706 (Sup. Ct. 1917), *aff'd* 228 N. Y. 521, 126 N. E. 900 (1920). *Contra:* Davern v. American Mutual Liability Insurance Co., 241 N. Y. 318, 150 N. E. 129 (1925). Both of these cases were written by the same judge who attempted a distinction based on the proposition that one dictating an application cannot reasonably rely on the agent's transcription but can reasonably rely on a transcription from a mailed application. In both cases the insured signed the final application containing the false statement.

[6] For an exhaustive discussion see VANCE, INSURANCE (2d ed. 1930) pp. 451-495, 528-529.

[7] *Ibid.* 451-458, 495-528, especially p. 508, n. 86 for cases holding that the parol evidence rule does not prevent proof of an estoppel. That this is further supported by the original character of estoppel as an equity doctrine, see 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919) § 802.

Nor can the accessibility doctrine be justified on the grounds that the good faith requisite to an estoppel is negatived since constructive knowledge is not sufficient. 2 POMEROY, *op. cit.* § 810, especially at 1665. And this doctrine further disregards the fact that the policy underlying estoppel in insurance law is not that people lack opportunity to read their policies but do not do so in fact. VANCE, INSURANCE (2d. ed. 1930) 214 *et seq.*

[8] 256 N. Y. 458, 176 N. E. 838 (1931).

for denying its equal admissibility where a representation in the application is involved. The holding in the case of *Satz v. Massachusetts Bonding & Insurance Company*[9] may, however, obstruct the way to a uniform attainment of this result. There the court denied parol proof of an estoppel in the case of a "warranty," as distinguished from a representation, in an application attached to the policy. But this doctrine, based upon a distinction admitted by the very court that invoked it to be difficult of application, is to be approved only insofar as by implication it would allow parol proof of an estoppel in the case of statements other than warranties. And Section 58 expressly states that application statements purporting to be made by the insured shall in the absence of fraud be deemed "representations" and not "warranties."

The "accessibility doctrine" is, however, to some extent reaffirmed by a *dictum* in the *Bible* case to the effect that if the application is attached to a policy, controversy as to the scope of the agent's powers is foreclosed by any limiting clauses therein contained.[10] But such clauses have never been given full effect by the Court of Appeals except through an invocation of the parol evidence rule and of Section 58. A careful distinction between waiver and estoppel will delimit the effect of this *dictum*. Since waiver rests upon the agent's apparent power to make a binding agreement any clause in the application which denies this power is usually held effective.[11] But a principal should not be able to prevent an estoppel by limitations upon his agents' powers in contravention of the established principle that one cannot exempt himself by contract from liability arising through the fraud of his agents.[12]

## Inheritance Taxation of Corporate Stock

By recent decisions repudiating its former tolerance of multiple taxation of intangibles the Supreme Court of the United States has held that bonds, bank deposits, promissory notes and simple debts are not subject to an inheritance tax in the state where they are physically present or at the domicile of the debtor.[1] This doctrine, in the case of *First National Bank of Boston v. Maine*,[2] was said to be "broader than the application thus far made of it,"[3] and was there extended to apply to stock in a Maine corporation left by a Massachusetts decedent. The Court, reemphasizing its position that multiple taxation of intangibles is discriminatory and in violation of the Fourteenth Amendment, went on to base its decision on the theory that the *situs* of intangibles is at the domicile of the owner and that taxation by any other state is consequently without due process of law.

The precise reasoning used gives scant support to the selection of the

[9] 243 N. Y. 385, 153 N. E. 844 (1926).

[10] *Supra* note 8, at 464, 176 N. E. at 840.

[11] VANCE, INSURANCE (2d ed. 1930) 431 *et seq.*

[12] *Ibid.* In Sternaman v. Metropolitan Life Insurance Co., 170 N. Y. 13, 62 N. E. 763 (1902), a clause in an application purporting to make the solicitor the agent of the insured was held invalid as an attempt to contract contrary to fact.

[1] Farmer's Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98 (1930); Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930); Beidler v. South Carolina Tax Commission, 282 U. S. 1, 51 Sup. Ct. 54 (1930). See also Comment (1932) 40 YALE L. J. 99.

[2] 52 Sup. Ct. 174 (Jan. 4, 1932).

[3] *Ibid.* 175.

domicile of the owner of corporate stock as the taxing jurisdiction. *Situs*, primarily denoting physical location, can scarcely be an attribute of the intangible property rights of which a stock certificate is merely the evidence.[4] The term *situs* may also serve to denote the place where an intangible may be effectively dealt with,[5] but used thus, it describes only the result rather than the basis of the decision. Conceding, however, that only one jurisdiction should be able to tax, the power seems reasonably to belong to the state which accords the privilege of succession. Since the great majority of states for their mutual convenience have chosen the state of domicile as the place of distribution of the testator's assets,[6] it is there, by common consent, that the privilege of succession is accorded.

[4] Pomerance, *The Situs of Stock* (1931) 17 CORN. L. Q. 43, 46; *cf.* GOODRICH, CONFLICT OF LAWS (1927) 407.

[5] Powell, *Business Situs of Credits* (1921) 28 W. VA. L. Q. 89, 96.

[6] GOODRICH, CONFLICT OF LAWS 397.